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Supreme Court of the United States.

OCTOBER TERM, 1970.

No. 471

DAVID L. MONOSSON AND RALPH A. LEVY,
Petitioners,
v.
UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

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Table of Contents.

Opinion below	1
Jurisdiction	1
Question presented	2
Statutory provision involved	2
Statement of the case	2
Reasons for granting the writ	4
1. This case presents a major question of the limits of Federal jurisdiction in areas traditionally thought to be reserved to the several states by the Tenth Amendment	4
2. The Court of Appeals for the First Circuit has ignored and circumvented the clear dicta and command of an opinion of this Court without making so much as an attempt to distinguish the instant case	10
Conclusion	14
Appendix A	15
Appendix B	19
Appendix C	23
Appendix D	27

Table of Authorities Cited.

CASES.

Buie v. United States, 396 U.S. 87	3, 5, 6, 7, 8, 10
Davidson v. United States (C.A. 1, No. 7564, July 2, 1970)	6n., 12, 13
Leary v. United States, 395 U.S. 6	4
Minor v. United States, 396 U.S. 87	3, 7

Nigro v. United States, 276 U.S. 332 6, 7, 9, 10, 11
Trusler v. Crooks, 269 U.S. 475 9
United States v. Doremus, 249 U.S. 86 9
White v. United States, 395 F. 2d. 5, cert. den. 393 U.S. 928 13

STATUTES.

United States Constitution, Tenth Amendment 2, 3, 4, 5, 7, 10
United States Constitution, Fifth Amendment 3
21 U.S.C. § 331(q)(2) 13
26 U.S.C.
§ 4705 (a) 11, 13
§ 4742 (a) 2, 3, 4, 5, 6, 7, 8, 9 10 13
§ 4751 5, 7, 9
28 U.S.C. § 1254(1) 2

MISCELLANEOUS.

26 C.F.R., §§ 152.22, 152.23 5
H.R. Rep. No. 792, 75th Cong., 1st sess., 2 10
S. Rep. No. 900, 75th Cong., 1st sess., 3 10
Hearings on H.R. 6906, 75th Cong., 1st sess., 6 10
Hearings on H.R. 6385, 75th Cong., 1st sess., 8 10

Supreme Court of the United States.

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No.

DAVID L. MONOSSON AND RALPH A. LEVY,
Petitioners,
v.
UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

The petitioners David L. Monosson and Ralph A. Levy respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the First Circuit entered in this proceeding on March 9, 1970.

Opinion Below.

The opinion of the court below is not yet reported (App. A). There was no opinion filed by the District Court.

Jurisdiction.

The judgment of the court below was entered on March 9, 1970. A timely petition for rehearing was denied on

July 2, 1970 (App. B) and this petition was filed within thirty days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254 (1).

Question Presented.

Whether 26 U.S.C. § 4742 (a) exceeds the powers delegated to the Federal Government by the Constitution of the United States and infringes the rights reserved to the several states by the Tenth Amendment to the Constitution, and, therefore, is unconstitutional.

Statutory Provision Involved.

26 U.S.C. § 4742 (a) (vol. 6, 1964 ed., p. 5526):

> "It shall be unlawful for any person, whether or not required to pay a special tax and register under sections 4751 to 4753, inclusive, to transfer marihuana, except in pursuance of a written order of the person to whom such marihuana is transferred, on a form to be issued in blank for that purpose by the Secretary or his delegate."

Statement of the Case.

Petitioner Levy was charged in a one-count indictment with being a transferor of marihuana not in pursuance of a written order of the person to whom marihuana was transferred in violation of 26 U.S.C. § 4742 (a) (App. C, p. 24). He filed a motion to dismiss the indictment asserting that

the statute deprived him of his right against self-incrimination in violation of the Fifth Amendment to the United States Constitution (App. C, p. 24). The motion was denied (App. C, p. 24). After a trial by jury petitioner was found guilty and received a term of imprisonment of five years (App. C, p. 25). He appealed the judgment to the Court of Appeals for the First Circuit.

Petitioner Monosson was charged in a two-count indictment with being a transferor of marihuana not in pursuance of a written order of the person to whom such marihuana was transferred in violation of 26 U.S.C. § 4742 (a) (App. D, pp. 27-28). He filed a motion to dismiss asserting the same protection as that alleged by petitioner Levy in his motion to dismiss (App. D, pp. 28-29). The motion was not acted upon. Therefore petitioner Monosson pleaded guilty to each count in the indictment and he received a term of imprisonment of five years on each count, said sentences to be run concurrently. Sentence was imposed on March 4, 1968. On August 1, 1969, he filed a motion to vacate sentence (App. D, pp. 30-31). This motion was denied on September 16, 1969 (App. D, p. 31). An appeal was subsequently filed with the Court of Appeals for the First Circuit.

The appeals were joined. Between the time of the writing of the briefs and the oral argument before the First Circuit, this Court handed down its decisions in *Minor* v. *United States* and *Buie* v. *United States*, 396 U.S. 87 (1969). As a result of the opinions in those cases, the petitioners filed a supplementary brief pertaining to the Tenth Amendment question. The Circuit Court of Appeals affirmed the judgments of the District Court against both petitioners and denied their timely petitions for rehearing (App. C, p. 26, App. D, p. 32).

Reasons for Granting the Writ.

1. THIS CASE PRESENTS A MAJOR QUESTION OF THE LIMITS OF FEDERAL JURISDICTION IN AREAS TRADITIONALLY THOUGHT TO BE RESERVED TO THE SEVERAL STATES BY THE TENTH AMENDMENT.

Petitioners argued in the Court of Appeals for the First Circuit that 26 U.S.C. § 4742 (a), a part of the multi-faceted Marihuana Tax Act, deals in an area in which the Federal Government has not been delegated any powers by the Constitution and which has been reserved to the several states by the Tenth Amendment for the exercise of their police powers.

This is a contention which goes to the heart of the workings of the Federal system, and petitioners' argument is an attempt to vindicate and give continued and renewed strength to our traditional reliance on state and local governments to exercise their police powers in areas where neither the framers of the Constitution nor latter-day interpreters of that document envisage the incursion of Federal power. The petitioners are mindful of the fact that this argument was not raised in the District Court below. However, both of the petitioners are presently incarcerated and valuable time would be lost if they were to be compelled to first present this argument at the district court level. It would seem that the ends of justice would be appropriately met if this Court took cognizance of and determined this issue now presented. *Leary* v. *United States*, 395 U.S. 6 (1969) can be considered authority for this procedure. Leary did not invoke his privilege against self-incrimination until after his trial in the District Court.

Your petitioners contend that the current structure of section 4742 (a) of the Marihuana Tax Act is such that the written order requirement is not reasonably related to any

bona fide tax collection purpose of the statute; that this portion of the statute is not a legitimate revenue measure; that this portion of the statute cannot be supported jurisdictionally by the congressional power to raise revenue; that the statute is not supported jurisdictionally by any other power delegated to the Federal Government by the United States Constitution; that this portion of the statute infringes the police powers reserved to the several states by the Tenth Amendment; and that, as a result of all of this, 26 U.S.C. § 4742 (a), is void and unenforceable by reason of being outside the proper scope of Federal power and jurisdiction. It is an anti-drug measure with no legitimate relation to the raising of revenue or to any other area in which the Federal Government has been delegated powers by the Constitution.

It is the contention of the petitioners that, as a result of binding interpretations of this statute made by the Supreme Court and as a result of the holdings and dicta announced in leading cases concerning this and similar statutes, the statutory section as it stands today falls clearly within that category of Federal legislation which cannot be sustained against constitutional attack. In short, section 4742 (a) is a police-type, penal regulation which falls within the police powers reserved to the states rather than within the powers delegated to the Federal Government. It is unrelated to, unconnected with, and unnecessary to the function of revenue collection pursuant to 26 U.S.C. § 4751, the section of the Internal Revenue Code which underlies and interconnects with § 4742 (a).

In the recent case of *Buie* v. *United States*, 396 U.S. 87 (1969), the court gave its approval to certain regulations, promulgated by the Treasury Department, 26 C.F.R. §§ 152.22, 152.23, which limit applicability of the registration requirement under the registration and occupational tax provisions of the Marihuana Tax Act (26 U.S.C. § 4751,

§ 4753) to persons whose dealings are legal under relevant state and local laws. This Court found that the regulations "are supported by the legislative history and represent what is by now long-established administrative practice." *Buie, supra*, at 93, fn. 6. Petitioners rely on *Nigro* v. *United States*, 276 U.S. 332 (1928), wherein Chief Justice Taft, speaking for the court, stated that the order form requirement of the Harrison Narcotics Act (the predecessor of what is now 26 U.S.C. § 4705 (a), which was significantly amended in 1936,[1] was constitutional because it bore a reasonable relationship to the permissible purpose of collecting the revenue. Chief Justice Taft carefully analyzed the entire Harrison Narcotics Act and stated emphatically that the order form provision of the Act was constitutional because the tax which the Act sought to collect was assessed against illegal (under state law) dealers as well as legal dealers, and that the order form provisions were reasonably necessary to insure the collection of the tax from unlawful dealers. The order form provision provided a needed cross-check as to who was selling narcotics and the Treasury Department could use this cross-check to determine if and when unregistered dealers, who failed to pay the occupational tax, were dealing in narcotics. Such dealers as were unauthorized under state law to sell narcotics could be expected to try to evade payment of the tax and registration, said Chief Justice Taft.

The point asserted by the petitioners here is quite subtle, yet reasonably simple. The *Nigro* opinion is the only pronouncement of the Supreme Court wherein the purposes and operations of the order form requirements of these drug tax statutes are analyzed. *Nigro* is the controlling

[1] This topic is explored in great detail in the case of *Davidson* v. *United States* (C. A. 1, No. 7564, July 2, 1970) in which a petition for certiorari was filed this day with the Clerk of the Supreme Court.

law in this area, and this fact is undisputed by the Government. Now that this Court has decided that the registration and tax provisions of the Marihuana Tax Act apply *only* to lawful drug dealers under state law and that unlawful dealers need not register and pay the occupational tax, there is no longer a reasonable relationship between the order form requirement of section 4742 (a) and the revenue raising (*i.e.*, imposition of tax) purpose of section 4751. The clear language of *Nigro* tells us that if unlawful traffickers are not among those from whom the tax is enacted, there is no need to provide the cross-check of the order forms.

It is respectfully submitted that this is a jurisdictional point of far-ranging importance to the Federal system. It is a matter on which the *Nigro* Court spoke definitively in 1928 and that opinion cannot be ignored now that this Court has, in *Buie* in 1969, construed the order form requirement of section 4742 (a) in such a way as to put it squarely within that category of statutes which *Nigro* clearly stated would be violative of the Tenth Amendment. An examination of the briefs submitted to the Supreme Court in *Buie*, as well as in its companion case, *Minor* v. *United States*, 396 U.S. 87 (1969), reveals that no Tenth Amendment argument was raised at any stage of that case. This Court cannot be expected or assumed to be so omniscient that, on its own, it would in every case explore every possible constitutional defect of a statute, even though a particular defect is not raised by a petitioner at any stage. Indeed, such a practice would be contrary to the Court's proclaimed policy of avoiding the decision of constitutional issues where possible. The Government may argue, in opposition, that this argument was examined by this Court because in the dissent by Mr. Justice Douglas (*Buie*, *supra*, at 98) he mentions the Tenth Amendment. However, examination of that dissent indicates that the dis-

tion asserted herein. [illegible] that since the statute can survive [illegible] only if it is truly a revenue raising measure [illegible] that it must be solely a revenue measure [illegible] of its purposes, must be to raise [illegible] becomes crucial that the statute be [illegible] in such a way that it actually raises [illegible] that, since the order form requirement [illegible] depends for its validity on its [illegible] the tax collecting scheme of the Marihuana [illegible] whole, if that tax collecting purpose fails [illegible] form provision must fall as well since [illegible] its reasonable relationship to the collection [illegible] He continues that, since the Government by [illegible] practice does not permit illegal dealers [illegible] the tax the Government has in effect admitted that the statute is not aimed at collecting revenue. Since [illegible] revenue is meant to be collected, there is no need for the order form requirement to protect the collection of revenue which is not meant to be collected in the first place. It is this argument which the majority and all of the dissenters in *Buie* chose not to discuss. Mr. Justice Douglas argues that the Government, by frustrating the administration of the statute, removes from the statute the validity of the statute to raise revenue. Therefore, he concludes, the statute cannot be predicated upon the power [illegible] and collect taxes.

Mr. Justice Douglas [illegible] the more subtle question raised by this [illegible] as to what happens to an order form requirement [illegible] detecting illegal drug dealers (under state law [illegible] to pay the Federal occupational tax when the statute ceases to require that such illegal dealers pay the tax to the [illegible] collector. There is no need to ferret out non-taxpayers when such non-taxpayers are not required to pay the tax.

The Marihuana Tax Act was modeled after the Harrison Narcotics Act, whose provisions the Supreme Court fully analyzed in *Nigro, supra*. Two things have happened since the Marihuana Tax Act was enacted. First, the provisions of the Harrison Act with respect to the registration requirements were amended in 1936. Thus, at the present time, according to the language of the Harrison Act, only persons *lawfully entitled* to deal in narcotics need register and pay the occupational tax. We have already examined the effect this amendment had upon the order form provisions in this new set of circumstances—a question which has never been passed upon by the Supreme Court, but a question easily answered by resort to the dicta and analysis of *Nigro* and *United States* v. *Doremus*, 249 U.S. 86,[2] coupled with the holding of *Trusler* v. *Crooks*, 269 U.S. 475 (1925).[3]

The registration and occupational tax provisions were never amended to conform to the present version of their related provisions in the Harrison Narcotics Act. Therefore, the statutory language of the Marihuana Tax Act, particularly 26 U.S.C. § 4751, remains the same as the pre-1936 Harrison Act provisions. However, it is not the same law as it was then. This Court has definitively interpreted the Marihuana Tax Act, particularly the registration and occupational provisions thereof, to apply only to lawful marihuana dealers under state law. Thus this Court has said in speaking of the section in issue today, 26 U.S.C. § 4742 (a), that "in order to register, dealers must show

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[2] The *Doremus Court* felt that the order form requirement tended to diminish the opportunity of unauthorized persons to obtain drugs and sell them clandestinely without paying the tax because it tended to keep the traffic from going underground.

[3] *Trusler* held that a purported excise tax in grain futures contracts was in actuality a penal measure aimed against gambling and, therefore, not a tax and void.

that they are in compliance with local laws . . ." *Buie* v. *United States*, 396 U.S. at 93, and to emphasize the point, Mr. Justice White's opinion of the Court added this footnote:

"The regulations, 26 CFR §§ 152. 22, 152. 23, which limit registration to persons whose dealings are legal under relevant state and local laws, are supported by the legislative history and represent what is by now long-established administrative practice. See *Leary* v. *United States*, 395 U. S. 6, 24 n. 38 (1969); H. R. Rep. No. 792, 75th Cong., 1st sess., 2 (1937); S. Rep. No. 900, 75th Cong., 1st sess., 3 (1937); Hearings on H. R. 6906 before a subcommittee of the Senate Committee on Finance, 75th Cong., 1st sess., 6 (1937); Hearings on H. R. 6385 before the House Committee on Ways and Means, 75th Cong., 1st Sess., 8 (1937)." *Buie*, *supra*, at 93-94, fn. 6.

There can be no doubt that only lawful marihuana dealers need register and pay the occupational tax. Therefore, the rationale for the constitutionality of the order form requirements of 26 U.S.C. § 4742 (a) set forth in *Nigro* falls squarely on its face.

The order form provision is a sham; it is a criminal, not a tax measure. It is unconstitutional in that it is in violation of the Tenth Amendment to the Constitution.[4]

2. THE COURT OF APPEALS FOR THE FIRST CIRCUIT HAS IGNORED AND CIRCUMVENTED THE CLEAR DICTA AND COMMAND OF AN OPINION OF THIS COURT WITHOUT MAKING SO MUCH AS AN ATTEMPT TO DISTINGUISH THE INSTANT CASE.

This Court in 1928 spoke definitively on the question of Federal power in the narcotic drugs area. Indeed, the case of *Nigro* v. *United States*, *supra*, has been cited time

[4] It is interesting to note that counsel for petitioners attempted to obtain a copy of an order form to append to this petition, but he discovered that not only was he unable to obtain an order form, but that there were none available in the Internal Revenue Office in Boston, either for perusal or for potential use.

and time again in upholding the Harrison Narcotics Act against constitutional attack. But the Court in *Nigro* made it equally clear that, while section 4705 (a) was constitutional because it bore a reasonable relationship to the collection of revenue from unlawful narcotics dealers who might be expected to evade payment of the tax, there would not be Federal jurisdiction and power to require such order forms if it were not for this revenue-collection and revenue-protection purpose, *i.e.*, if such unlawful narcotics dealers were not required to pay the tax sought to be collected and protected. As Chief Justice Taft said:

> "These order form provisions constitute a needed check on illegal sales, and they are distinctly helpful in the detection of an attempted dealing in, or selling of, the drug free from the tax." *Nigro* v. *United States*, 276 U.S. 332, 346.

And, said the *Nigro* Court:

> "In interpreting the Act, we must assume that it is a taxing measure, for otherwise it would be no law at all. If it is a mere act for the purpose of regulating and restraining the purchase of the opiate and other drugs, it is beyond the power of Congress and must be regarded as invalid . . . Everything in the construction of § 2 must be regarded as directed toward the collection of the taxes imposed in § 1 and the prevention of evasion by persons subject to the tax. If the words can not be read as reasonably serving such a purpose, § 2 can not be supported." *Nigro* v. *United States*, 276 U.S. 332, 341-342.

Since after the 1936 amendment section 4705 (a) cannot be "regarded as directed toward the collection of the taxes . . . and the prevention of evasion by persons subject to the tax," this statutory section "cannot be supported."

Yet the Court of Appeals for the First Circuit in *Davidson* v. *United States, supra,* dismissed Davidson's contention in a *per curiam* opinion consisting of less than two full pages of text. The Court of Appeals completely ignored Mr. Chief Justice Taft's quite clear analysis and substituted instead its own notion that:

> "[i]t does not follow that because the defendant is exempt from the occupational tax, federal tax collection is not aided by the information sought in the order form." *United States* v. *Davidson, supra.*

The Court of Appeals goes on to argue that the supplier of the defendant might be a lawful importer who had neglected to pay his own occupational tax. But this is irrelevant to the issue at hand since the order form would not supply the Government that information. Nor can the order form supply the Government with information as to whether or not the narcotics were subject to excise taxes not paid by the original importer or manufacturer, which information, the Court of Appeals argues, "might set in motion a chain of inquiry directly related to the collection of federal taxes." *United States* v. *Davidson, supra.*

Finally, the Court of Appeals states that "the government has a valid interest in obtaining information for less immediate purposes." As an example, the court argues that since the Government might some day wish to reinstate the narcotic tax insofar as unlawful sellers are concerned, it has the right to keep track of "how much revenue is sacrificed by its exemption of unlawful dealers, with an eye to reinstating the tax." *United States* v. *Davidson, supra.* But this kind of reasoning would totally destroy the nature of the Federal system, for it would allow the

Federal Government to enact any and all controls over any and all activities on the theory that some day the Federal Government might want to make that activity taxable. Such reasoning makes it painfully clear that sections 4705 (a) and 4742(a) are sham tax statutes. The statute (4742 (a)) does not assist in collecting or protecting the revenue; it merely will continue to regulate the illicit narcotic traffic until the Congress some day might decide to make this traffic a subject of the Federal tax-raising power.

The opinion of the First Circuit in *Davidson, supra,* was handed down on the same day as the denial of the petitioners' petitions for rehearing. The First Circuit added insult to injury by stating that they found no merit in petitioners' argument and summarily dismissed the petition.

Finally, it should be kept in mind that the statutory section here at issue is only one small part of the overall regulatory scheme contained in the Marihuana Tax Act. The striking down of the order form provisions of 26 U. S. C. § 4742 (a) will not invalidate any other section or provision of the Act. Petitioners' reasoning does not seek to attack the power of Congress to require payment of a narcotic tax and to punish evasion of the tax. Petitioners attack only the power of Congress to devise a cross-check to assist in the collection of a tax which is not imposed in the first place. Nothing in petitioners' argument would prevent the Congress from regulating the drug traffic under its powers pursuant to the Commerce Clause, as has been done in the case of stimulant and depressant drugs and hallucinogens. See, for example, 21 U. S. C. § 321(q)(2). *White* v. *United States,* 395 F. 2d 5 (1st Cir. 1968), cert. den. 393 U. S. 928 (1969).

Conclusion.

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the First Circuit.

Respectfully submitted,

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August 1, 1970.

Appendix A.

UNITED STATES COURT OF APPEALS

For the First Circuit

No. 7395.

UNITED STATES OF AMERICA,

APPELLEE,

v.

RALPH A. LEVY,

DEFENDANT, APPELLANT,

No. 7433.

MAURICE ROLAND LEVESQUE,

APPELLANT,

v.

UNITED STATES OF AMERICA,

APPELLEE,

No. 7439.

DAVID L. MONOSSON,

PETITIONER, APPELLANT,

v.

UNITED STATES OF AMERICA,

RESPONDENT, APPELLEE.

APPEALS FROM THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF MASSACHUSETTS

Before ALDRICH, *Chief Judge*, WOODBURY,* *Senior Circuit Judge*, and MCENTEE, *Circuit Judge*.

Kevin Keating, with whom *Joseph S. Oteri* and *Crane, Inker & Oteri* were on briefs for appellants in Nos. 7395 and 7439.

Bernard J. Dwyer for appellant in No. 7433.

James B. Krasnoo, Assistant U. S. Attorney, with whom *Herbert F. Travers, Jr.*, United States Attorney, and *Edward J. Lee*, Assistant U. S. Attorney, were on briefs for appellee.

WOODBURY, *Senior Circuit Judge*. These three appellants were separately indicted, tried, convicted and sentenced in the United States District Court for the District of Massachusetts for selling marihuana in violation of the Marihuana Tax Act. Title 26 U.S.C. § 4742(a). At first they contended that the statutory obligation to sell marihuana only pursuant to a written order on an official order form on which the name of the seller appears violated their Fifth Amendment privilege against self incrimination. In support of their contention they relied upon *Marchetti* v. *United States*, 390 U.S. 39; *Grosso* v. *United States*, 390 U.S. 62; *Haynes* v. *United States*, 390 U.S. 85, all decided in 1968, and *Leary* v. *United States*, 395 U.S. 6 (1969). But § 4742(a) was held immune to attack on Fifth Amendment grounds on December 8, 1969, when the Supreme Court of the United States handed down its unanimous decision in *Buie* v. *United States*, —— U.S. ——, wherein it distinguished the *Marchetti*, *Grosso*, *Haynes* and *Leary* cases and affirmed a conviction for selling marihuana in violation of the section saying: "There is no real and substantial possibility that the § 4742(a) order form requirement will in any way incriminate sellers for the simple reason that sellers will seldom, if ever, be confronted with an unregistered purchaser who is willing and able to secure the order form."

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* By Special Designation.

Thereafter by leave of this court the appellants filed a supplemental brief challenging the constitutionality of § 4742(a) on a different ground.* They now say that the section has no legitimate relation to the raising of revenue or to the control of interstate or foreign commerce. They say that it is only a sham tax statute but actually a penal statute falling within the police powers of the several states and therefore in an area forbidden to the federal government by the Tenth Amendment which provides: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States are reserved to the States respectively, or to the people."

It is true that the Court in *Buie* did not notice the existence of any Tenth Amendment question with respect to § 4742(a). But we can hardly assume that the Court in affirming Buie's conviction under that section overlooked or ignored a possible Tenth Amendment infirmity. Indeed it is evident that the Court neither overlooked or ignored the Tenth Amendment in *Buie*, for the two Justices who dissented in *Minor* v. *United States*, decided in the same opinion with *Buie*, wherein a conviction for selling heroin in violation of Title 28 U.S.C. § 4705(a) was affirmed, mentioned that Amendment in their dissent. Thus these Justices, who did not dissent in *Buie*, certainly had the Tenth Amendment in mind in that case as well as *Minor*. And their dissent in *Minor* must have alerted the other members of the Court to a possible Tenth Amendment question in *Buie*. The obvious conclusion from the opinion in *Buie* is that all the Justices must have thought that any

* We do not pause to consider the Government's suggestion that we should remand this tardily raised constitutional question to the District Court before deciding it ourselves. The question presented is purely one of law which can be decided now on the present records as well as later after further proceedings in the court below.

possible Tenth Amendment infirmity in § 4742(a) was too insubstantial to warrant mention.

The judgments of the District Court are affirmed.

Appendix B.

UNITED STATES COURT OF APPEALS
For the First Circuit

No. 7395.

UNITED STATES OF AMERICA,
APPELLEE,
v.
RALPH A. LEVY,
DEFENDANT, APPELLANT,

No. 7439.

DAVID L. MONOSSON,
PETITIONER, APPELLANT,
v.
UNITED STATES OF AMERICA,
RESPONDENT, APPELLEE.

OPINION ON PETITION FOR REHEARING

Before ALDRICH, *Chief Judge*, WOODBURY,* *Senior Circuit Judge*, and MCENTEE, *Circuit Judge*.

Kevin Keating, with whom *Joseph S. Oteri* and *Crane, Inker & Oteri* were on briefs for appellants.

James B. Krasnoo, Assistant U. S. Attorney, with whom *Herbert F. Travers, Jr.*, United States Attorney, and *Edward J. Lee*, Assistant U. S. Attorney, were on briefs for appellee.

* By Special Designation.

rehearing two of the [illegible] Monosson, against [illegible] 6 of the Marihuana Tax Act [illegible] unconstitutional and void because [illegible] but a regulatory act within the police powers reserved to the several states by the Tenth Amendment. In support of their contention they rely principally upon *Nigro* v. *United States*, 276 U. S. 332, wherein the Court construed § 2 of the Act of December 17, 1914, 38 Stat. 785, commonly called the Harrison Narcotics Act, as amended by the Revenue Act of 1918, 40 Stat. 1057, 1130, as making it unlawful for "any person who [illegible] required to register and pay a tax [illegible] narcotic drugs specified [illegible] suance of a written order [illegible] by the Commissioner of Internal Revenue, and held that, so construed, the Act was a taxing act not open to attack on Tenth Amendment grounds.

The argument on behalf of the petitioners-appellants runs that the Court in *Nigro* indicated that if the Harrison Narcotics Act were [illegible] to registered, and hence [illegible] applicable only constitutional exercise [illegible] it would not be a stitutional exercise of the [illegible] reserved to the states by the Tenth Amendment. That the Marihuana Tax Act applies only to persons [illegible] state law so that unlawful [illegible] legally under pay a tax and that from [illegible] reasonable relationship [illegible] ment of § 4742(a) and the [illegible] posed by § 4751 to § 4753 [illegible]

We find no merit in this [illegible] may have been wrought [illegible] Harrison Narcotics Act

of 1914 by its amendment in 1936, 49 Stat. 1745, the fact remains that § 4742(a), like § 2 of the Harrison Narcotics Act of 1914 as it stood when construed by the Court in *Nigro* applies to "any person." Indeed the Marihuana Tax Act is even more specific in its application to unlawful traffickers than the Harrison Narcotics Act as it read in 1928 when it was considered and construed by the Court in the *Nigro* case, for in § 4742(a) the words "any person" are immediately followed by the words "whether or not required to pay a tax and register under sections 4751 to 4753 inclusive."

There is no merit in counsel for the petitioners'-appellants' argument that the Court in the *Buie* case, reported *sub nom. Minor* v. *United States*, 396 U.S. 87 (1969), by approving in footnote 6 (pages 93, 94) regulations, 26 CFR §§ 152.22, 152.23, which limit registration to persons whose dealings in the drug are legal under state laws thereby held that the Marihuana Tax Act applied only to drug dealers selling lawfully under state law so that unlawful dealers did not need to register and pay a tax. The regulations referred to, as the text of the footnote indicates, only limit registration, and hence qualification, for the lower tax imposed on registered dealers. The regulations do not undertake to absolve unregistered dealers from payment of any tax whatsoever. The Marihuana Tax Act, like the Harrison Narcotics Act in 1928, applies to "any person" whether registered as a dealer or not. The difference between registered and unregistered dealers is that the latter must pay a higher tax. The Court pointed this out very clearly in the body of its opinion in *Minor* wherein at page 90 it said:

> "Under pertinent provisions of the Marihuana Tax Act, 26 U.S.C. §§ 4751-4753, every person who sells, deals in, dispenses, or gives away marihuana must register with the Internal Revenue Service and pay

a special occupational tax. The Act also imposes a tax on transfers of marihuana, to be paid by the transferee; the rate for those who have registered and paid the occupational tax is $1 per ounce; for those who have not or cannot register the rate is $100 per ounce."

The petition for rehearing is denied.

Appendix C.

[RALPH A. LEVY]

Relevant Docket Entries.

1969.

March 18 Indictment returned.

June 2 GARRITY, J. Criminal jury trial continues—evidence. Motions to dismiss by both defendants, filed and Denied Without Prejudice. Adjourned to tomorrow at 10 AM.

3 GARRITY, J. Criminal jury trial continues—evidence. Conclusion of govt's evidence. Deft, Levy's motion for directed verdict, Denied. Deft., Schlesinger's motion for directed verdict, Denied. Court stated it would treat motions as motions for judgment of acquittal. Continued to tomorrow at 10 AM.

June 4 GARRITY, J. Criminal jury trial continues—Court strikes Exhibit C from evidence and orders exhibit C be marked C for Identification. Arguments—Charge—Committed to the jury for deliberation; Verdict. Both Defendants, Levy and Schlesinger, Guilty. Commissioner's bail continued. Disposition: June 16th at 2 P.M.

16 GARRITY, J. Deft., Levy, with counsel, appeared for disposition—deft. sentenced to 5 years imprisonment. Deft's motion to stay imposition of sentence, filed in Court and Denied. Deft's oral motion for stay of execution of sentence pending appeal, Allowed by the Court. Bail continued.

24 GARRITY, J. Judgment and Commitments on Defts. Levy and Schlesinger Entered. Copies to U. S. Atty., Deft's counsel, Marshal and Probation.

26 Deft Levy's notice of appeal filed. Copy to Wm. Koen, Asst. U.S. Atty.

Indictment.

[Filed March 18, 1969.]

The grand jury charges:

On or about October 18, 1968, at Boston in the District of Massachusetts, Ralph A. Levy, of Boston in said District, and Gerald C. Schlesinger, of Boston in said District and of Rochester in the Western District of New York, did unlawfully transfer 26.52 grams, more or less, of marihuana, not in pursuance of a written order of the person to whom such marihuana was transferred on a form issued in blank for that purpose by the Secretary of the Treasury or his delegate; in violation of 26 U.S.C. 4742(a).

A True Bill.

ROBERT D. SALINGER
Foreman of the Grand Jury.

WILLIAM J. KOEN
Assistant United States Attorney.

Motion of Defendant Ralph A. Levy to Dismiss.

[Filed June 2, 1969.]

Now comes the defendant Ralph A. Levy and prays that this honorable court dismiss the charge against him.

By his attorney,
LEON J. LEVENTHAL

6/2/69. Denied, GARRITY, J.

Motion for Directed Verdict.

[Filed June 3, 1969.]

Now comes the defendant, Ralph A. Levy, and respectfully moves that this Honorable Court direct the Jury to return a verdict of Not Guilty.

By his attorney,

LEON J. LEVENTHAL.

6/3/69. Denied, GARRITY, J.

Judgment.

On this 16th day of June, 1969 came the attorney for the government and the defendant appeared in person and by counsel

IT IS ADJUDGED that the defendant upon his plea of not guilty and a verdict of guilty has been convicted of the offense of unlawfully transferring marihuana, not in pursuance of a written order on a form issued in blank for that purpose by the Secretary of the Treasury or his delegate; in violation of Title 26, United States Code, Section 4742(a), as charged in an Indictment of One Count and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

IT IS ADJUDGED that the defendant is guilty as charged and convicted.

IT IS AAJUDGED that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of five (5) years; execution of said prison sentence stayed pending appeal.

IT IS ORDERED that the Clerk deliver a certified copy of this judgment and commitment to the United States Mar-

shal or other qualified officer and that the copy serve as the commitment of the defendant.

W. ARTHUR GARRITY, JR.
United States District Judge.

Judgment.

Entered March 9, 1970

This cause came on to be heard on appeal from the United States District Court for the District of Massachusetts, and was argued by counsel.

Upon consideration whereof, It is now here ordered, adjudged and decreed as follows: The judgment of the District Court is affirmed.

By the Court:
DANA H. GALLUP
Clerk.

Notice.

CLERK'S OFFICE
U.S. COURT OF APPEALS FOR THE FIRST CIRCUIT

No. 7395. July 9, 1970

United States of America
v.
Ralph A. Levy

Mandate herein issued today.

DANA H. GALLUP,
Clerk

Appendix D.

[David L. Monosson.]

Relevant Docket Entries.

1969		
Aug.	1	Petitioner's Motion to Vacate Sentence, filed with c/s.
		Petitioner's Motion for Hearing, filed with c/s.
Sept.	16	Garrity, J. Order denying motion to vacate sentence, entered. Copies to counsel.
	25	Petitioner's notice of appeal filed. Copy to James Krasnoo, Asst. U.S. Attorney.

Indictment.

[Filed July 29, 1966.]

The grand jury charges:

Count One.

David L. Monosson, of Brookline, in the District of Massachusetts, on or about June 29, 1966, at Brookline, in said District, did transfer 26.50 grams, more or less, of marihuana, not in pursuance of a written order of the person to whom such marihuana was transferred, on a form issued in blank for that purpose by the Secretary of the Treasury or his delegate; in violation of Title 26, United States Code, Section 4742(a).

Count Two.

David L. Monosson, of Brookline, in the District of Massachusetts, on or about July 19, 1966, at Cambridge, in said District, did transfer 103 grams, more or less, of mari-

huana, not in pursuance of a written order of the person to whom such marihuana was transferred, on a form issued in blank for that purpose by the Secretary of the Treasury or his delegate; in violation of Title 26, United States Code, Section 4742(a).

Substitute Motion to Dismiss Indictment.

[Filed September 21, 1967.]

Defendant moves this Honorable Court, pursuant to Rule 12, Federal Rules of Criminal Procedure, to dismiss the Indictment in the above-entitled action for the reason that the statutory section under which the Defendant is being prosecuted, namely Title 26, United States Code, Section 4742(a), as it would be applied to the Defendant, is unconstitutional in that:

1) The statute is arbitrary and irrational and is not suited to achieve any valid legislative end in that it fails to properly distinguish between marihuana and so-called "hard narcotics" and imposes harsh penalties upon possession and sale of marihuana, which penalties are part of a legislative scheme for the control of narcotics which does not distinguish marihuana from substances of great potential harm and danger, and all this is accomplished without a showing in the legislative history, in the act, or elsewhere, that use of this substance poses a threat to the public health, safety or morals, and any such claims of grave dangers are contrary to the scientific evidence, which evidence was and is being ignored by the Government and hence the statute violates the Due Process clause of the Fifth Amendment to the United States Constitution.

2) The statute would deny to the Defendant his rights to life, liberty and property, without due process of law, as well as the right to security, privacy, and the pursuit of

pleasure and a livelihood, in violation of the Fourth and Fifth Amendments to the United States Constitution.

3) The statute would impose upon the Defendant excessive and cruel and unusual punishment in violation of the Eighth Amendment to the United States Constitution, in that the penalty for transferring or receiving marihuana is unreasonably more harsh than the penalities for abusing far more dangerous drugs and substances, and in that the statute takes away from the Courts the discretion to mitigate penalties for Defendants in the position of your Defendant in this prosecution.

4) The statute is an exercise of powers reserved to the states or to the People by Amendment X to the Constitution of the United States, and it is an infringement upon the police powers of the States under the guise of a revenue raising statute.

5) The statute would deprive Defendant of his right against self-incrimination, in violation of the Fifth Amendment to the United States Constitution.

6) The statute would deny to the Defendant un-enumerated rights retained by the People in accordance with Amendment IX to the Constitution of the United States, which rights may not be derogated or infringed upon without a showing that the exercise of these rights would constitute a real and immediate threat to the public health, safety or morals.

7) The statute is penal in nature, and the so-called tax levied under the statute and demanded by the Internal Revenue Service is unlawful because it is in the nature of a penalty against the Defendant's participation in activities which may not be controlled or penalized by the Federal Government.

DAVID L. MONOSSON
By his attorneys,
CRANE, INKER & OTERI
By: Joseph S. Oteri

Judgment.

On this 4th day of March, 1968 came the attorney for the government and the defendant appeared in person and by counsel

It is adjudged that the defendant upon his plea of guilty has been convicted of the offenses of transferring marihuana, not in pursuance of a written order on a form issued by the Secretary of the Treasury or his delegate; in violation of Title 26, United States Code, Section 4742(a) as charged in a Two-Count Indictment and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

It is adjudged that the defendant is guilty as charged and convicted.

It is adjudged that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of five (5) years on Count 1, and five (5) years on Count 2; said prison sentence to run concurrently.

It is adjudged that

It is ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

W. ARTHUR GARRITY, JR.,
United States District Judge.

Defendant's Motion to Vacate Sentence.

[Filed August 1, 1969.]

Now comes the Defendant, David L. Monosson, by his Attorney and moves this Honorable Court to vacate the

sentence imposed upon him by this Court in the above-captioned Indictment, and Defendant gives as his reasons therefor the following:

The Defendant timely pleaded in his Substitute Motion to Dismiss that his Privilege Against Self-Incrimination contained in the Fifth Amendment to the United States Constitution provided a complete defense to the offenses charged in the Indictment, but that this Court erroneously denied said Motion to Dismiss, and in view of subsequent decisions of the Supreme Court of the United States, said Motion should have been granted, and defendant is entitled to have his sentence vacated forthwith.

By his attorneys,

CRANE, INKER & OTERI

by JOSEPH S. OTERI

Order Denying Motion to Vacate Sentence.

September 16, 1969

Garrity, J. After hearing, and upon consideration of the briefs filed by the parties, the court concludes that the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief. *United States* v. *Buie*, 2 Cir. 1969, 407 F.2d 905, cert. granted 37 U.S.L.W. 3493; cf. *United States* v. *Castro*, 1 Cir. decided July 25, 1969, No. 7195.

W. ARTHUR GARRITY, JR.

United States District Judge.

Judgment

Entered March 9, 1970

This cause came on to be heard on appeal from the United States District Court for the District of Massachusetts, and was argued by counsel.

Upon consideration whereof, it is now here ordered, adjudged and decreed as follows: the order of the District Court is affirmed.

By the Court:

DANA H. GALLUP

Clerk.

Notice

CLERK'S OFFICE

U.S. COURT OF APPEALS FOR THE FIRST CIRCUIT

No. 7439 July 9, 1970

David L. Wasserman

v.

United States of America

Mandate herein issued today.

DANA H. GALLUP,

Clerk

LIBRARY
SUPREME COURT, U. S.

No. 471

In the Supreme Court of the United States

OCTOBER TERM, 1970

DAVID L. MONDSON AND RALPH J. DEPS, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ERWIN N. GRISWOLD,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 471

DAVID L. MONOSSON AND RALPH A. LEVY, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioners were convicted in separate proceedings in the United States District Court for the District of Massachusetts of transferring marijuana not in pursuance of a written order form, in violation of 26 U.S.C. 4742(a). The court of appeals affirmed (Pet. App. A) and thereafter denied a petition for rehearing with a further opinion (Pet. App. B).

Petitioners here reassert the contention rejected below that the statute violates the Tenth Amendment because it is allegedly not a genuine revenue measure. This contention falls for the reasons set forth in the opinions below on which we rely here.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

AUGUST 1970.

402-901—70

U.S. GOVERNMENT PRINTING OFFICE: 1970